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In The

Supreme Court of the United States

ROGER AND VIRGINA GALLAND,

Petitioners,

v.

CITY OF CLOVIS, CLOVIS CITY COUNCIL, and CLOVIS MOBILE HOME RENT COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF OF *AMICI CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS® AND NATIONAL ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITION FOR WRIT OF CERTIORIARI

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BRIEF OF *AMICI CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS® AND NATIONAL ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae*, the California Association of REALTORS® (hereinafter CAR) and the National Association of REALTORS® (hereinafter NAR), submit this brief in support of the petitioners, Roger and Virginia Galland, in their Petition for Writ of Certiorari.

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

CAR is a non-profit, voluntary, trade association incorporated in California whose members consist of local Boards and Associations of REALTORS®, and approximately 94,000 persons licensed as real estate brokers and salespersons by the State of California, as well as affiliate members such as real estate appraisers, title insurers, mortgage lenders, and real estate attorneys. Furthermore, CAR is actively engaged in promoting and establishing reasonable standards to govern the transfer of real estate and the protection of private property rights. CAR pursues its objectives through a variety of

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[1] The parties have consented to the filing of this brief. The joint letter of consent is on file with the Clerk of the U. S. Supreme Court.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

methods, including education of its members, creation of standard form agreements for use in real estate transactions, lobbying, providing legal advice to its members, and participation as *amicus curiae* in relevant court cases.

Members of CAR assist the public in buying, selling, leasing, developing and managing residential, commercial and industrial real estate as well as mobilehomes. Thus, these members, as well as the public they assist, are directly impacted by the actions of local municipalities in regulating real property as well as mobilehomes.

NAR is a non-profit professional association incorporated in Illinois representing persons in the real estate industry nationwide. As such, NAR is a champion of the rights of real property owners throughout the entire country. NAR's membership, which includes all the REALTOR® members of CAR as well as the members of REALTOR® associations in every other state, consists of approximately 760,000 persons involved in all aspects of the real estate profession, including brokerage, management, appraisal, and counseling. Through its participation in cases before this Court and others, NAR has long sought to preserve for property owners the rights guaranteed to them by the 5th and 14th Amendments to the Constitution.

Unfortunately, due to the oftentimes misguided, or in some cases even hostile, actions that local municipalities and courts have taken with regard to landowners' constitutional rights, both CAR and NAR have been actively involved in land use cases. CAR and NAR have participated previously as *amici curiae* before numerous courts including the seminal cases of *Nollan v. California Coastal*

Comm'n, 483 U.S. 825 (1987), and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and more recently in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). NAR also participated as *amicus curiae* in *Preseault v. ICC*, 494 U.S. 1 (1990).

The current state of affairs in California again makes it imperative that CAR and NAR take on their responsibilities as *amici curiae*. In the case before this Court, the California Supreme Court has denied landowners their constitutional rights by barring action under 42 U.S.C. § 1983 unless these landowners first exhaust lengthy and burdensome administrative procedures. The California Supreme Court's decision thus represents a fundamental misunderstanding and misapplication of this Court's well-established precedents, requiring correction and clarification by this Court.

CAR, NAR and their members are concerned with the abuse of power by local government that infringes upon the constitutional rights of landowners. The California Supreme Court's constitutionally flawed analysis precludes a property owner from the opportunity to challenge the constitutional propriety of a regulator's excessive and burdensome administrative proceedings unless and until the property owner endures further lengthy and costly administrative proceedings. As stated by California Supreme Court Justice Brown in her dissenting opinion describing the action taken by the court, "We now intervene to eviscerate a federal civil rights remedy whose very purpose is to provide an alternative to abusive or corrupt state adjudicative procedures like those the Gallands had to endure. . . . " *Galland v. City of*

Clovis, 24 Cal. 4th 1003, 1046 (2001). This Court's action is necessary to correct this error by the influential California Supreme Court, lest it be replicated by courts elsewhere to permit further constitutional injury to property owners throughout our nation.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE CALIFORNIA SHOULD NOT BE PERMITTED TO PRE-EMPT FEDERAL LAW AND CIRCUMVENT DUE PROCESS RECOVERY UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. In Violation of Constitutional Law, California Requires Exhaustion of Administrative Remedies Prior to Allowing a Section 1983 Claim.

Landowners like the Gallands, who suffer economic harm as a result of unconstitutionally overzealous or excessive land use regulation, have various constitutional remedies available, including a 5th Amendment takings claim, a 14th Amendment equal protection claim, and 14th Amendment procedural and substantive due process claims (42 U.S.C. § 1983). In the land use arena, this Court has consistently protected landowners against due process violations in contravention of the 14th Amendment. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

Previous decisions of this Court, as well as prior California case law, have made it eminently clear that a plaintiff need not exhaust state judicial or administrative remedies prior to filing a due process claim in either state

or federal court. *Felder v. Casey*, 487 U.S. 131 (1988) (Wisconsin notice of claim statute requiring special procedures prior to filing Section 1983 claim is pre-empted pursuant to the Supremacy Clause); *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982) (Exhaustion of state administrative remedies is not a prerequisite to an action under Section 1983); *Brosterhous v. State Bar of California*, 12 Cal. 4th 315 (1995) (Section 1983 action cannot be limited by the existence of state procedures to arbitrate the issues).

In this case now before the Court, however, *Galland v. City of Clovis*, 24 Cal. 4th 1003 (2001), the California Supreme Court carves an exception to the due process rights secured by the federal constitution in relation to land use and, in particular, regulation of mobilehome park rents. The California Supreme Court held that a landowner may maintain an action for damages under Section 1983 only after the landowner first exhausts administrative remedies. Specifically, according to the court, a governmental agency must, in effect, be afforded the opportunity to conduct further administrative hearings in an attempt to undo the grave constitutional violations it caused in the first round of administrative hearings. As noted by Justice Brown in her dissenting opinion, "this exhaustion requirement applies even where unfairness in the administrative hearing process was the source of the constitutional injury. This conclusion directly contravenes *Patsy v. Florida Board of Regents*. . . . " *Galland* at 1045. There is no basis for an exception to the principle embodied in and embraced by *Patsy* in the context of Section 1983 challenges to land use regulation, and it is essential that this Court review this

case in order to correct the contrary holding of the California Supreme Court.

The facts of this case will give any landowner nightmares. The egregious acts of the rent control commission (Commission) and city council (Council) of the City of Clovis (collectively, hereinafter, Clovis) were condemned by both the trial court and the California Court of Appeal. The trial court described the Clovis rent review process as "so time consuming burdensome and expensive that the potential benefits of participating in the process were nonexistent and illusory, all of which the Commission and Council were well aware, but nevertheless, continued to perpetuate." CT 2571-2572 (Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 26) (Petitioner's Appendix at 149).[2]

According to the California Court of Appeal, " 'the long and tortured path this case has taken to date militates against sending the matter back for further administrative proceedings addressing these ancient claims.' " *Galland* at 1029.

The Clovis rent control ordinance itself invites the tortuous path to which Petitioners were subject, since it provides no standards for calculating appropriate rental increases.[3] Prior to the administrative review hearings for the 1988 rent increase, the Gallands requested, but never

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[2] CT refers to the trial court transcript; Supp CT refers to the supplemental trial court transcript of the administrative proceeding.

[3] In 1993, Clovis amended its rent control ordinance to permit automatic annual rent increases tied to the Consumer Price Index. *Galland v. City of Clovis*, 24 Cal. 4th 1003, 1018.

received, any clear guidelines as to the materials and information Clovis wanted produced for the administrative hearings. Subsequently, Clovis managed to make many costly and unreasonable demands for information (e.g., confidential information on the other mobilehome parks managed by their property manager, such as the cash flow for the sixteen other parks, including figures for income and expenses for *ten years for each park*).[4] Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 13 (Petitioner's Appendix at 8-9).

The Gallands incurred huge legal and expert witness fees in educating the Commission and the Council as to the appropriate guidelines in applying the Clovis rent control ordinance. During the Commission hearing, in reply to the Gallands' claim that they had incurred these fees in response to the order of the Council, the Chairperson of the Commission, Charlene Wallert, stated:

> You were faced with a council with the idea of having to do this and you knew in your mind that it was expensive and probably you knew that even if you got the $6 rate increase, it wouldn't pay for the money you've expended on this. Why at that point did[n't] you say, "this is too expensive for me. I'm just going to drop the whole thing and apply for a rent increase

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[4] The administrative proceedings on the 1988 $6.00 per month rental increase cost the Gallands $141,257. Supp. CT 1 *et seq.* (Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 13). The cost of the 1989 proceedings was $31,955. Supp. CT 1 *et seq.* (Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 17). The 1990 proceedings cost the Gallands $47,541. Supp. CT 1 *et seq.* (Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 21).

next year?" Supp. CT 2662:3-12 (Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 15).

Thus, the ordinance, and the California Supreme Court's elimination of the Gallands' right to challenge the constitutionality of its application to them, places the Gallands between the proverbial rock and a hard place. In order to get their $6 per month rental increase, they had to educate the Commission and Council regarding the appropriate method of determining a reasonable rate of income and an appropriate price index to apply to factor in inflation. In order to satisfy Clovis's demands for additional information, the Gallands had to hire costly legal and financial experts to compile extensive narrative information as well as charts and tables comparing various mobilehome parks.

Notwithstanding the Gallands' substantial investment of time, effort, and money, the Commission held that the Gallands could not treat these fees as operating costs – meaning they cannot recoup these costs by increasing the rental rates. Even the President of the Commission expressed surprise that the Gallands bothered to ask for a rental increase when the cost of asking was greater than the return from the rental increase. Clovis had effectively created a Catch-22 situation for landowners!

Indeed, the critical importance of the Gallands' right to challenge the city's action is reinforced and illustrated by Clovis's delay of the administrative process, causing further losses and constitutional injury to the Gallands. For example, the hearing on the 1988 rent increase, in which the Commission disallowed the legal and expert

fees as operating expenses, was concluded on December 13, 1989, (Supp. CT 2702) (Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 16), but the Gallands were not permitted to appeal this decision to the Council until the final written decision was issued by the Commission. Nevertheless, the Commission refused to issue a final decision until January 29, 1992 – two years later – and they only did so after the Gallands sought a court order directing its issuance. Supp. CT 2462 *et seq.* (Gallands' Cal. Sup. Ct. Answer Brief on the Merits at 16).

Thus, the egregiousness of the City's actions is clear, and is only further aggravated by the California Supreme Court's denial of the Gallands' right to even challenge those actions until after the Gallands first pursued further proceedings before the City. This Court's intervention is essential to correct these abuses before that flawed result is adopted in other jurisdictions as well.

B. The California Supreme Court Has Created a Convoluted Process For Analyzing Due Process Violations That, By Itself, Violates Due Process.

The California Supreme Court has created a needless, unnecessarily complicated, unprecedented and unjust procedure that rental property owners must endure to seek redress for due process violations by California rent control regulators. This is apparent in two respects. First, the court focused on the injury imposed by "confiscatorily low rents" and concluded that, with respect to the due process rights of the owner, such economic deprivations must be treated the same as those caused by a 5th Amendment taking. The court suggests that there has

been no due process violation if a *Kavanau* adjustment could compensate the landowner for the confiscatorily low rents.[5]

According to the court in *Kavanau*, the adjustment in future rents for due process violations is simply akin to the amortization of the costs of capital improvements over the useful life of those improvements. *Kavanau* at 769. What is the useful life of the costs of excessive overburdensome administrative proceedings? *Kavanau* does not provide an answer. Furthermore, in *Kavanau*, the court was not dealing with a flawed *process* as we have in the case before this Court, but instead a flawed *result*. However, the California Supreme Court in *Galland*, acknowledging that a *Kavanau* adjustment might prove to be inadequate to make the landowner whole, provides the following rule:

> [W]hen landlords seek section 1983 damages from allegedly confiscatory rent regulation, we hold that they must show (1) that a confiscatory rent ceiling or other rent regulation was imposed and (2) that relief via a writ of mandate and a *Kavanau* adjustment is inadequate. *Galland* at 1025.

Unlike a 5th Amendment inverse condemnation claim, however, where an *element* of the claim is the

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[5] A *Kavanau* adjustment refers to the remedy created by the California Supreme Court in *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761 (1997), for an inverse condemnation claim. The court held that Kavanau was not entitled to maintain his inverse condemnation action because he could obtain "a full and adequate remedy for any interim loss flowing from the due process violation through an adjustment of future rents under the rent regulation process." *Id.* at 767.

government's failure to provide just compensation, a due process violation occurs where the government has *acted* in a sufficiently arbitrary fashion and injured the claimant. Whether or not the government has later provided a remedy for the injury does not eliminate the due process violation. Thus, there is no constitutional basis to treat inverse condemnation and due process claims similar for Section 1983 purposes, and subject the latter, like the former, to the *Kavanau* adjustment process.

Second, the California Supreme Court also erred in its consideration of the "excessive procedural costs" – those increased costs arising from the flawed rent control review process and the resultant litigation. After establishing a new "deliberately flouts the law" standard for finding a violation of substantive due process, the court rejects the trial court's findings and remands the cause to the trial court again. *Galland* at 1030-1040.

In essence, the California Supreme Court has created a procedural nightmare for a landowner who must go to the trial court for a rehearing to determine if Clovis has "deliberately flouted the law." In the event Clovis is found guilty only of "bureaucratic bungling," short of the California Supreme Court's standard for a constitutional violation, the landowner may have to return again to Clovis for another attempted *Kavanau* adjustment. Should the excessive administrative costs be so great that a *Kavanau* adjustment is not possible, then must the landowner go to the trial court again? Will Clovis now be found guilty of a constitutional violation if the administrative and procedural costs are so great that a *Kavanau* adjustment is impossible? Or, will the landowner have to

go bankrupt because the costs created by the administrative process exceed the future flow of income from rents?

The entire convoluted process created by the California Supreme Court places an additional and unwarranted hardship on landowners who have already spent huge sums of money in their frustrated attempts to comply with the requirements of a vague rent control ordinance and a demanding, insatiable Commission and Council.

This process is reminiscent of another in the land use arena, as described by a legal scholar:

> Local governments . . . may violate the substantive due process rights of landowners, and then rely on lengthy local appeals processes to forestall suit in federal court. Landowners of limited financial means may not be able to endure the lengthy administrative processes and litigation. . . . " David S. Mendel, Note, *Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments*, 95 Mich. L. Rev. 492, 496 (1996).

Clearly the convoluted process crafted by the California Supreme Court for bringing Section 1983 due process claims places such a totally unreasonable burden on California rental property owners that the process itself violates landowners' constitutional rights to due process under the law.

C. California's Reliance On a *Kavanau* Adjustment Violates Public Policy By Placing the Burden of the Excessive Damages Caused By the City On Innocent Parties.

This Court should also review this case because of yet another unacceptable effect of the California Supreme Court's extraordinarily strict "flouts the law" standard for finding a violation of the Gallands' due process rights resulting from the unduly burdensome and costly process for seeking a rent increase: Because of the court's determination that the "excessive procedural costs" may be considered and included when determining allowable rental increases pursuant to a *Kavanau* adjustment, the court's holding allows these costs to be imposed on innocent parties. *Galland* at 1040. By insisting that these "excessive procedural costs" be taken into account, if at all, as part of the *Kavanau* adjustment, the court is imposing absolutely no liability upon Clovis for its due process violations and is instead placing the burden on innocent landowners as well as innocent mobilehome tenants caught in the middle. *Id.* at 1040.

The California Supreme Court will hold Clovis liable for these costs only if the city imposed the costs originally "in deliberate contravention of the law to obstruct the Gallands' constitutionally based property rights." *Id.* at 1040. Thus, not only does the California Supreme Court place a costly burden upon landowners by its creation of a standard that allows a tremendous level of abuse against landowners before any liability is imposed upon the city, but to the extent the city has not acted quite outrageously enough to meet that standard, the

court's holding allows those costs to be shifted to the present and future tenants of the owner.

Thus, the California Supreme Court holding means that despite "shifting" demands, "costly" demands, "ill-considered requests for information" that create a burdensome, costly, outrageously expensive hearing process by governmental agencies, ultimately the landowner and the tenants are the ones most likely to foot the bill. The governmental agency responsible for all the additional unreasonable costs can get away with violating due process. Landowners and the mostly economically-disadvantaged tenants of mobilehome parks will have to pay for the city's egregious mistakes.

The California Supreme Court in *Galland* has therefore, in effect, carved an exception to Section 1983 remedies at the expense of the federal constitutional rights of California mobilehome park owners and tenants. Not only does this "exception" violate the constitutional rights of California landowners and tenants, but it will have a negative impact ultimately on the availability of low-cost housing such as mobilehomes. Moreover, unless this Court acts to correct this result and declare this abusive process constitutionally defective, other courts will undoubtedly follow California's high court holding and subject property owners in other jurisdictions to a like fate. This consequence is of great concern to both CAR and NAR.

There are mobilehome parks not only throughout California, but the entire nation. In fact, as the number of retired Americans increases so will the need for low-cost housing such as mobilehomes. If allowed to stand, the

ruling in *Galland* will have a deleterious impact on the availability of this type of low-cost housing. Owners of mobilehome parks must accept rent control as a cost of being in the rental business. However, park owners cannot afford to pay the excessive and burdensome administrative costs resulting from municipalities' "bureaucratic bungling" when park owners seek rental adjustments merely to earn a fair and reasonable return on their property.

The California Supreme Court offers the following advice to mobilehome investors:

> For those price-regulated investments that fall above the constitutional minimum, but are nonetheless disappointing to investor expectations, the solution is not constitutional litigation but, as with nonregulated investments, the liquidation of the investments and the transfer of capital to more lucrative enterprises. *Galland* at 1026.

Mobilehome park owners, like the Gallands, may very well heed the advice of the California Supreme Court and turn their mobilehome parks into more lucrative enterprises at the expense of those tenants who most need low-cost housing.

CONCLUSION

Despite the trial court's findings and California Court of Appeal's conclusions that Clovis violated the Gallands' due process rights, the California Supreme Court holds that "remand to the city is what *Kavanau*

prescribes. . . . Clovis has endeavored to amend its rent control ordinance to make it more efficient and expeditious. If Clovis engages, however, in further needless delay, then a writ of mandate to the trial court may legitimately request that the court intervene to set the proper rental rates, and the city may be liable for section 1983 damages." *Galland* at 1029. The California Supreme Court then aggravates this error by also establishing an unprecedented and extraordinarily high standard for determining whether the procedure to which the owners were subject in seeking an adjustment to the rents violated their due process rights.

The holding in *Galland* creates an exception to well-established constitutional law. This Court should not allow this decision to stand. To deny a writ of certiorari is to suggest that *Galland* correctly reflects the law as established by this Court. Clovis and other governmental entities in California are now free to trample landowners' due process rights. It makes no sense. Nor is it fair. California landowners should not be deprived of their rights under the U.S. Constitution.

For the reasons stated herein, this Court should grant the Petition for a Writ of Certiorari.

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